Limits of Judicial Authority in Pretrial Settlement Under Rule 16 of the Federal Rules of Civil Procedure

I. Introduction

Growing federal district court dockets and backlogs of cases have created a need for effective judicial management of cases at an early stage of the proceedings. A growing movement among federal and state trial court judges to expand the use of pretrial conferences over the years since the Federal Rules of Civil Procedure were adopted in 1938 has resulted in an amendment to those rules in 1983 to include specific mention of settlement discussions in pretrial proceedings. The use of these amendments as well as rules 1 and 83 has led to a revolution in pretrial conferences which has introduced nontraditional pretrial settlement procedures, such as court annexed alternative dispute resolution mechanisms, into nation-wide use. Within the contexts of these new pretrial settlement conferences, the question presents itself: what limitations are placed on judicial authority in ordering the parties to participate in nontraditional pretrials such as summary jury trials and court annexed arbitration programs? Evaluation of this question requires a review of Rule 16 both before and after its amendment in 1983, an examination of existing pretrial procedures, an analysis of the benefits as well as the problems of nontraditional pretrial proceedings, and finally, an inventory of case law which discusses judicial authority in pretrial settlement proceedings.

II. History of Rule 16

Rule 16 has evolved from its original state in which settlement proceedings were a by-product of a pretrial conference to the modern version in which settlement is not only encouraged in pretrial conferences but the use of extrajudicial procedures to resolve the dispute is endorsed. This evolution is documented by the changes in Rule 16, the Advisory Committee Notes for the 1983 amendments, and the body of case law which discusses the operation of pretrial conferences under both the old and new versions of Rule 16.

The adoption of Rule 16 of the Federal Rules of Civil Procedure has perhaps been the greatest single factor in bringing about widespread use of pretrial procedure, not only because it enabled pretrial conferences to be utilized in every federal district court, but also because of the example it has furnished to the state courts and to bar groups and others interested in the reform of state procedure.[1] Rule 16 stood as promulgated from 1938 to 1983 when it was completely revised. Amend-

1. 3 Moore's Federal Practice, para. 16.06 (2d ed. 1985).

ments to Rule 16 were proposed in 1955 but were not adopted.[2] The Advisory Committee cites the "significant changes" in federal civil litigation since 1938 to meet the challenges of modern litigation.[3]

As Rule 16 was originally drafted, the primary purpose of the pretrial conference was to define claims and defenses of parties for the purpose of eliminating unnecessary proof and issues, lessening opportunities for surprise and thereby expediting trial.[4] The office of the pretrial order as a procedural tool was to insure economical and efficient trial of every case on its merits without surprise.[5] Judge Clark of the Second Circuit noted, in *Padovani v. Bruchhausen*, 293 F.2d 546, 548 (1961), that Federal Rule of Civil Procedure 16 "calls for a conference of counsel with the court to prepare for, not to avert, trial, leading to an order which shall recite the agreements made by the parties as to any of the matters considered." The pretrial conference was to be viewed as subordinate and conciliatory, rather than compulsive, in character.[6] The purpose of the pretrial under the original Federal Rule of Civil Procedure 16 was "[T]o simplify the issues, amend the pleadings where necessary, and to avoid unnecessary proof of facts at the trial."[7]

A federal district judge under the original Rule 16 had authority to promulgate rules for and supervise the pretrial phase of litigation with the view of sifting issues and reducing delays and expense of trial so that the suit would go to trial only on questions as to which there was an honest dispute of fact or law.[8] A district court judge was given broad discretion in supervising the pretrial phase of litigation and absent a showing of clear abuse of such discretion the exercise thereof would not be disturbed on appeal.[9] The Federal Rule of Civil Procedure relating to pretrial procedure was not compulsory, and if the district judge viewed the case as a simple one, he had the option of simply ordering the case calendared for trial.[10]

The pretrial procedure was designed to provide, inter alia, a clear statement of issues to be tried.[11] The plaintiff was called upon to reveal in the pretrial statement the theory of his case. He was required to state the issues he posed for trial with sufficient certainty and clarity

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2. *Id.* at 16.01(1).
3. FED R. CIV. P. 16 advisory committee note, 1983 amendment, introduction.
4. Wallin v. Fuller, 476 F.2d 1204, 1208 (5th Cir. 1973); Manbeck v. Ostrowski, 384 F.2d 970, 975 (D.C. Cir. 1967); Meadow Gold Products Co. v. Wright, 278 F.2d 867, 869 (D.C. Cir. 1960).
5. Smith v. Ford Motor Co., 626 F.2d 784, 795 (10th Cir. 1980).
6. McCargo v. Hedrick, 545 F.2d 393, 402 (4th Cir. 1976).
7. Federal Deposit Ins. Corp. v. Glickman, 450 F.2d 416, 419 (9th Cir. 1971).
8. Delta Theatres, Inc. v. Paramount Pictures, Inc., 398 F.2d 323, 324 (5th Cir. 1968).
9. Federal Deposit Ins. Corp. v. Glickman, 450 F.2d 416, 419 (9th Cir. 1971).
10. McCargo v. Hedrick, 545 F.2d 393, 397 (4th Cir. 1976).
11. Johnson v. Geffen, 294 F.2d 197, 199 (D.C. Cir. 1960).

to apprise the trial court and opposing defense of what they must expect in the course of the trial.[12] The original Rule 16, however, was never meant to make lawyers try a case on paper instead of in the courtroom.[13] Under the traditional use of the pretrial conference, it was generally held that Rule 16 should not be implemented in such a manner that the pretrial procedure itself was more difficult and time consuming than the actual trial.[14]

The traditional pretrial conference, as authorized by the original Rule 16, was thought to improve the quality of justice rendered in the federal courts by sharpening the preparation and presentation of cases, tending to eliminate trial surprise and improving, as well as facilitating, the settlement process.[15] However, the Rule had not always been as helpful as it might have been. The Advisory Committee cited widespread feeling that amendment was necessary to encourage pretrial management that would meet the needs of modern litigation when it adopted the 1983 amendments.[16]

Rule 16 was extensively amended in 1983. The provisions of Rule 16 were divided into subdivisions (a) through (f). In addition, Rule 16 was retitled from "Pre-Trial Procedure; Formulating Issues" to "Pretrial Conferences; Scheduling; Management."[17]

At the present time, Rule 16 provides, in part, as follows:

Rule 16. Pretrial Conferences; Scheduling; Management

(a) *Pretrial Conferences; Objectives.* In any action, the court may in its discretion direct the attorneys for the parties . . . to appear before it for a conference or conferences before trial for such purposes as . . .

(5) facilitating the settlement of the case . . .

(c) *Subjects to be Discussed at Pretrial Conferences.* The participants at any conference under this rule may consider and take action with respect to . . .

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute; . . . At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed . . .

(f) *Sanctions.* If a party or party's attorney fails to obey a sched-

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12. *Id.*
13. McCargo v. Hedrick, 545 F.2d 393, 401 (4th Cir. 1976).
14. *Id.*
15. FED. R. CIV. P. 16 advisory committee note, 1983 amendment, introduction.
16. *Id.*
17. 3 MOORE'S FEDERAL PRACTICE, para. 16.01(5) (2d ed. 1985).

> uling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge upon motion or his own initiative, may make such orders with regard thereto as are just . . . . In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any non-compliance with this rule. Including attorney's fees . . . .[18]

The 1983 amendments to Rule 16 expanded the list of matters that could be discussed at a pretrial conference to make Rule 16 a more accurate reflection of actual practice.[19] Clause (7) explicitly recognizes that it had become commonplace to discuss settlement at pretrial conferences.[20] Increased judicial control during the pretrial process accelerates the processing and termination of cases.[21] Since the amended rule encourages more extensive pretrial management than did the original Rule, two or more conferences may be held in many cases.[22] The Advisory Committee noted that pretrial settlement conferences obviously eased crowded court dockets and resulted in savings to the litigants and the judicial system.[23] The Committee felt that settlement should be facilitated at as early a stage of the litigation as possible. Although it was not the intended purpose of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants, it was believed that providing a neutral forum for discussing the subject might foster settlement.[24] In addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute. This includes urging the litigants to employ adjudicatory techniques outside of the courthouse.[25]

Original Rule 16 did not mention the sanctions that might be imposed for failing to comply with the Rule. However, courts have not hesitated to enforce it with appropriate measures. To reflect the existing practice, and to obviate dependence upon Rule 41(b) or the court's inherent power to regulate litigation, Rule 16(f) expressly provides for imposing sanctions on disobedient or recalcitrant parties, their attorneys, or both.[26]

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18. FED. R. CIV P. 16.
19. FED. R. CIV. P. 16 advisory committee note, 1983 amendment, subdivision (a).
20. FED. R. CIV. P. 16 advisory committee note, 1983 amendment, subdivision (c).
21. *Id.*
22. FED R. CIV. P. 16 advisory committee note, 1983 amendment, subdivision (e).
23. FED. R. CIV P. 16 advisory committee note, 1983 amendment, subdivision (c).
24. *Id.*
25. *Id.*
26. FED R. CIV. P. 16 advisory committee note, 1983 amendment, subdivision (f).

III. PRETRIAL PROCEDURES WHICH HAVE ARISEN UNDER THE AUSPICES OF RULE 16

Federal district courts have adopted local rules which outline procedures for pretrial settlement conferences and alternative methods of dispute resolution pursuant to Federal Rules of Civil Procedure 1, 16, and 83.[27] These local rules have introduced a high degree of diversity into federal pretrial procedure.[28] Even districts within the same state vary in their application of pretrial procedures.[29]

Among the districts which utilize non-traditional pretrial procedures, defined here as those proceedings which have a goal as opposed to a by-product of settlement, there are several common characteristics. Four of six districts reviewed here which have non-traditional provisions for pretrial continue to use the traditional pretrial conference in conjunction with them.[30] Of the six districts using non-traditional pretrial procedures, four used procedures entitled "arbitration,"[31] one used a procedure entitled "mediation" which for all purposes really is an arbitration,[32] and one used a method entitled a "summary jury trial."[33]

The litigants were selected for participation in the alternative dispute resolution programs in three districts based on the amount of money damages in controversy.[34] In the Eastern District of Pennsylvania, all civil cases (excluding social security cases and prisoners' civil rights cases) wherein money damages only are being sought in an amount not in excess of $75,000 are referred to compulsory arbitration.[35] The Clerk of Court in the Eastern District of New York designates and processes compulsory arbitration cases using the same criteria except the monetary limitation is $50,000.[36] Both of these provisions provide a presumption that the civil case is within the monetary jurisdiction of the compulsory arbitration unless the counsel for the plaintiff certifies otherwise or the counsel for the defense counterclaims or crossclaims in excess of that

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27. FED. R. CIV. P. 1 provides in part: "They (the Rules) shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 83 provides in part: "Each district court . . . may from time to time make and amend rules governing its practice not inconsistent with these rules."

28. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 540 (1985).

29. *See* E.D. CAL. L.R. 252, N.D. CAL. L.R. 500, and S.D. CAL. L.R. 235; *see also* E.D. N.Y. LOCAL ARB. R. 3, W.D. N.Y. L.R. 16.

30. E.D. CAL.; E.D. PENN.; N.D. CAL.; E.D. MICH.

31. E.D. CAL. L.R. 252; E.D. N.Y. LOCAL ARB. R. 3; E.D. PENN. L.R. 8-3(A); and N.D. CAL. L.R. 500.

32. E.D. MICH. L.R. 32.

33. N.D. OHIO L. CIV. R. 17.02.

34. E.D. N.Y. LOCAL ARB. R. 3; E.D. PENN. L.R. 8; N.D. CAL. L.R. 500; N.D. OHIO L. COMP. R. 2.01.

35. E.D. PENN. L.R. 8-3(A).

36. E.D. N.Y. LOCAL ARB. R. 3.

amount.[37] The Northern District of California provides for a jurisdictional limitation on its mandatory arbitration program of controversies involving $100,000 or less.[38] However, it also provides a voluntary program for litigants who wish to stipulate that they are to be referred to arbitration which has no monetary restriction.[39]

The Northern District of Ohio takes the opposite approach. In contrast to referring those cases which have less at stake on the basis of a monetary evaluation to non-traditional pretrial procedures, this district refers litigants to its Summary Jury Trial when the amount in controversy exceeds $1,000,000. This procedure is usually reserved for cases which would be considered complex, although other cases are referred to the procedure at judicial discretion. The court recommends that litigants consult the "Manual for Complex Litigation", which is a Federal Judicial Center publication, when participating in the Summary Jury Trial.[40]

In the remaining two districts reviewed, the amount in controversy is irrelevant to participation in the non-traditional pretrial procedure. The Eastern District of Michigan uses its own discretion to select cases for its "mediation" program. This court may submit any civil diversity case to mediation when the relief sought is exclusively money damages.[41] Litigants may elect to participate on a voluntary basis in the Eastern District of California which specifically provides that its referrals are made without regard to the amount in controversy.[42]

The requirements of the court from the parties in preparation for their participation in each respective alternative dispute resolution program appear to involve a familiarity with their own case. The Eastern District of California requires participants to have completed discovery prior to the date set for the hearing.[43] The Northern District of California requires participants to select their arbitration panel.[44] Both the Northern District of Ohio and the Eastern District of Michigan require participants to attend the hearing.[45] While the Northern District of California does not explicitly require attendance, it does provide that no member shall participate in the award without having attended the hearing.[46] If a party "fails to participate in a meaningful manner," the Eastern District of Pennsylvania may sanction up to the striking of the litigants demand

37. E.D. PENN. L.R. 8-3(C); E.D. N.Y. LOCAL ARB. R. 3(C).
38. N.D. CAL. L.R. 500-2.
39. N.D. CAL. L.R. 505.
40. N.D. OHIO L. COMP. R. 2.01, 2.03.
41. E.D. MICH. L.R. 32.
42. E.D. CAL. L.R. 252.
43. E.D. CAL. L.R. 252(d).
44. N.D. CAL. L.R. 500-4(a).
45. N.D. OHIO L. COMP. R. 2.01; E.D. MICH. L.R. 32(e)(3).
46. N.D. CAL. L.R. 500-6(b).

for a trial de novo.[47] Both the Northern District of Ohio and the Eastern District of Michigan also require that the litigants submit a written statement or documentation of their claim.[48]

The effect of the alternative dispute resolution proceeding may be binding, advisory, or, in most cases, "rejectable."[49] The result is binding only in the Eastern District of California, but in this program the participants were selected on an entirely voluntary basis.[50] The result is strictly advisory in the Summary Jury Trial in the Northern District of Ohio.[51] This proceeding is particularly useful when the difference between the parties is a perception of how a jury would perceive their case. The half-day proceeding is designed to provide a "no-risk" method by which the parties may obtain the perception of six jurors on the merits of their case without a large investment of time or money.[52] In four of the jurisdictions, the arbitration award will become the judgment of the court, unless one of the litigants demands a trial de novo within 28 or 30 days.[53]

If the litigants should choose a trial de novo, the evidence of or even the fact of the arbitration is not admissible in that trial.[54] However, if the arbiter's award is more favorable to the party demanding the trial de novo than that of the trial court, both the Eastern District of New York and the Eastern District of Pennsylvania require the litigant to pay the cost of the arbitration.[55] In the Eastern District of Michigan, the party demanding the trial de novo must improve the judgment by ten percent, or that party will bear the cost of the arbitration proceeding.[56]

IV. BENEFITS OF NON-TRADITIONAL PRETRIAL PROCEEDINGS

It has long been held that pretrial proceedings, whether for preparation for trial or for settlement conference, are an integral and vital part of the judicial process.[57] The traditional pretrial conference has been called "a marvelous instrument in search for justice." It served a function of high value as it narrowed issues, reduced the field of fact controversy for resolution by court or jury, and simplified the mechanics of the

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47. E.D. PENN. L.R. 8-5(c).
48. N.D. OHIO L. COMP. R. 2.04; E.D. MICH. L.R. 32(e)(2).
49. E.D. CAL. L.R. 252; E.D. N.Y. LOCAL ARB. R. 6; E.D. PENN. L.R. 8-6; N.D. CAL. L.R. 500; E.D. MICH. L.R. 32(j)(l); N.D. OHIO L. COMP. R. 2.01.
50. E.D. CAL. L.R. 252.
51. N.D. OHIO L. COMP. R. 2.01.
52. T. D. LAMBROS, METHODS OF DISPUTE RESOLUTION 10 (1984).
53. E.D. N.Y. LOCAL ARB. R. 6; E.D. PENN. L.R. 8-6; N.D. CAL. L.R. 500-6(c); E.D. MICH. L.R. 32(j)(1).
54. E.D. N.Y. LOCAL ARB. R. 7(c); E.D. PENN. L.R. 8-7(c).
55. E.D. N.Y. LOCAL ARB. R. 7(d); E.D. PENN. L.R. 8-7(d).
56. E.D. MICH. L.R. 32(j).
57. In re LaMarre, 494 F.2d 753, 756 (6th Cir. 1974).

offer and receipt of evidence. Its aim was to assure justice with a maximum of efficiency in time and expense of court, of counsel, and of litigants.[58]

The non-traditional pretrial proceedings aimed at settlement attempt to build on these virtues. Successful settlement reduces time between the filing and disposition of cases; likewise, it saves time for the judge and facilitates the reduction of the court calendar. Moreover, settlement saves money for all parties to a lawsuit because the costs of both trials and appeals are avoided. Settlement also gives control of the case to the contesting parties allowing them to settle the case before trial, before a verdict, before an appeal, or during or after the appellate process. Finally, settlement also yields certainty to the parties.[59]

Advocates of judicial involvement in settlement discussions argue that the practice increases judicial efficiency. Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.[60] More cases are settled and cases that would be settled later, are settled sooner. Advocates further claim that the legal system should maximize the number of settlements because they save court and litigant time and expense; they produce more satisfaction with the judicial process among litigants and lawyers; and they establish results that are often superior to judicial rulings. Parties are happier because both sides, in agreeing to a compromise, believe that the result is fair under the circumstances. Settlements are often superior to a judicial ruling because parties and lawyers have a more accurate knowledge of their cases than does a judge or jury. Moreover, in many cases a judgment would be too stark or extreme, and settlements can be more flexible in bringing about a just result.[61]

Studies of judicial intervention in pretrial conferences demonstrate the success of judicial involvement. An experiment in the Supreme Court of Ontario at Toronto yielded a 90% settlement rate as contrasted to the less than 70% settlement rate for cases which were not pretried.[62] It is important to note that these settlements were not the result of "head-knocking sessions" at which settlement was forced on counsel by

58. Plourde, *Pretrial in Maine Under New Rule 16: Settlement, Sanctions, and Sayonara*, 34 ME. L. REV. 111, 112 (1982).

59. Wall & Schiller, *Judicial Involvement in Pre-Trial Settlement: A Judge is Not A Bump On A Log*, 6 AM. J. TRIAL ADVOC. 27, 28-29 (1982).

60. FED. R. CIV. P. 16 advisory committee note, 1983 amendment, introduction.

61. Oesterle, *Trial Judges in Settlement Discussions: Mediators or Hagglers?*, 9 CORNELL L. FORUM, June 1982, at 7, 8.

62. Plourde, *Pretrial in Maine Under New Rule 16: Settlement, Sanctions, and Sayonara*, 34 ME. L. REV. 111, 116-18 (1982).

the presiding judge, but rather an exercise in third party mediation.[63] In the Salt Lake County Court in Utah, a study of the third judicial district showed that a pretrial conference has a significant influence on the disposition of cases. Fifty percent of those cases scheduled for pretrial conferences settled.[64] In the Western District of Pennsylvania, a standardized pretrial practice was introduced in 1958 when 2,195 civil cases were pending with a three to four year delay in disposition. After an "unceasing and relentless" application of this procedure, requiring in flagrant cases the imposition of sanctions, penalties, fines, and dismissals on dilatory and non-complying counsel, the backlog of cases was reduced to 1,396 cases within two years.[65]

The newest variation on the pretrial conference is court-annexed arbitration. This method has demonstrated an ability to substantially reduce the proportion of cases that ultimately go to trial in two districts in which it was tested.[66] There are two potential functions of court-annexed arbitration. It compels subject cases to obtain an advisory verdict through an informal, trial-like proceeding. This advisory verdict might resolve the case prior to trial, either by being accepted by the parties or by serving as the basis of a posthearing settlement. It also sets a time limit on preparing the case for the arbitration hearing, by requiring that the hearing be held within about seven months from the time the case was filed. This timetable may bring about more rapid settlements than would otherwise occur by prompting counsel to give attention to the case.[67] Thus, it appears that court-annexed arbitration can serve as an effective deadline for case preparation, substituting for trial not as a forum for case resolution but as a stimulus to settlement.[68] Reception of the court-annexed arbitration by members of the bar has been overwhelming. More than one half of those involved in the arbitration agreed that the proceedings resulted in a more rapid termination of their cases. The evidence also points toward litigant satisfaction with the quality of justice dispensed.[69]

V. Concerns With Non-Traditional Pretrial Proceedings

A number of concerns present themselves upon review of judicial use of pretrial proceedings. Among these concerns are the discontinuity with the intent of Rule 16, over-regulation and under-regulation in

63. *Id.* at 117 n.39.
64. *Id.* at 119.
65. *Id.* at 119-20.
66. Levin, *Foreword* to A. Lind & J. Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Courts at viii (1983).
67. *Id.* at 8.
68. *Id.* at xiii.
69. *Id.* at ix.

pretrials, ineffectiveness of the pretrial, and the deleterious effect of pretrial settlement attempts on the judge. Many of these concerns, however, are products of traditional pretrial conferences under the auspices of former Rule 16. The 1983 amendments to Rule 16 were intended to neutralize the majority of these issues.

The Federal Rules of Civil Procedure were based on the bedrock premise that cases filed in a federal district court were to be resolved through adversarial litigation before the court, not by summary proceedings before a mediator.[70] Former Rule 16 and Rule 28 relating to pretrial procedure authorized district courts to conduct a conference with counsel for the purpose of aiding in the disposition of the case and for the purpose of making the trial easier. The purpose of these Rules was to help the lawyers and litigants, not to exhaust them.[71]

Critics of local rules promulgated under Rule 16 prior to the 1983 amendments found the over-regulation and under-regulation produced by Rule 16 to be inefficient. The local rules were found to be an unnecessary burden on the attorneys when they were applied to "ordinary" cases in the same manner as the complex cases.[72] In simple, run-of-the-mill cases, attorneys found the pretrial requirement burdensome.[73] When the pretrial conferences occurred long before the actual trial, the attorneys were reluctant to narrow the issues.[74] The average or ordinary case was over-administered, put to duplication of effort and resulted in fruitless preparation.[75] This led to a series of minitrials that resulted in a waste of an attorney's time and needless expense to clients.[76] The Advisory Committee Note to the 1983 amendments of Rule 16 addressed these concerns when it stated that scheduling and pretrial conferences are encouraged in appropriate cases, they are not mandated.[77]

Critics found the former Rule to be no more helpful in the complex cases. The discretionary character of the former Rule 16 and its orientation toward a single conference late in the pretrial process led to under-administration of complex or protracted cases. Without judicial guidance beginning shortly after institution, the cases often became mired in discovery.[78] The 1983 amendments addressed this issue with

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70. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 545 (1985).

71. McCargo v. Hedrick, 545 F.2d 393, 397 (4th Cir. 1976).

72. Note, *Pretrial Conference: A Critical Examination of Local Rules Adopted by Federal District Courts*, 64 VA. L. REV. 467 (1978).

73. FED. R. CIV. P. 16 advisory committee note, 1983 amendment, introduction.

74. Note, *Pretrial Conference: A Critical Examination of Local Rules Adopted by Federal District Courts*, 64 VA. L. REV. 467 (1978).

75. M. Pollack, *Pretrial Procedures More Effectively Handled*, 65 F.R.D. 475 (1975).

76. FED. R. CIV. P. 16 advisory committee note, 1983 amendment, introduction.

77. *Id.*

78. *Id.*

with an Advisory Committee Note which explicitly stated the amended rule encouraged more extensive pretrial management than did the original and that two or more conferences could be held in many cases.[79]

Other critics claimed that the traditional pretrial was simply ineffective. As applied under the local rules of various judges and courts, pretrial procedures resulted in useless, unnecessary, unprofitable expenditures of time, effort, and expense in the majority of litigation. The critics held that the conference represented a "mere compilation of legalistic contentions and pleadings without any real analysis of the particular case."[80] The result of the conferences was thought to be "formal agreements on minutiae" which had no significant effect on the result of the case.[81] The conferences were seen as unnecessary, time-consuming, and burdensome in cases plainly destined to be settled before trial.[82] They were ceremonial, ritualistic exercises with little actual impact or actual value to the bar or the trier of fact.[83] A California study supported these contentions in that it found the effect of pretrials to be negligible.[84] It noted that the mandatory pretrial was inefficient and that judicial time could have been more effectively used in endeavors other than the pretrial conference.[85] A study of pretrial in the New Jersey court system by Professor Rosenburg found that judicial time was sacrificed unnecessarily when pretrial conferences were mandatory.[86] Both of these studies, however, predate the 1983 amendments to Rule 16 and their current validity is inconclusive.

A concern also exists that an attempt to reach settlement in pretrial conferences will have a deleterious effect on the judge. The judge's interest in settlement at the pretrial could actually limit the effectiveness of the conference. The judge would give less attention to narrowing the issues and planning the trial if settlement were the primary goal. If the case should reach trial, critics speculate that the pretrial order probably will not be as useful as it might otherwise have been. The coercive atmosphere in the conference would not be conducive to collaborating planning of the trial. Opponents of non-traditional pretrials hold that a settlement should be a natural by-product of the pretrial process rather than a specific objective.[87] The judge who has strenuously but unsuc-

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79. FED. R. CIV. P. 16 advisory committee note, 1983 amendment, subdivision (e).
80. McCargo v. Hedrick, 545 F.2d 393, 400 (4th Cir. 1976); FED. R. CIV. P. 16 advisory committee notes, introduction.
81. *Id.*
82. *Id.*
83. *Id.*
84. Plourde, *Pretrial in Maine Under New Rule 16: Settlement, Sanctions, and Sayonara*, 34 ME. L. REV. 111, 115 (1982).
85. *Id.* at 116.
86. *Id.*
87. *Id.* at 126.

cessfully pursued a settlement at pretrial may not be sufficiently impartial to preside at the subsequent trial.[88] This concern seems to have been taken into account by at least one of the court-annexed arbitration programs developed pursuant to the modern Rule 16 which prohibits the same judge from presiding in both the pretrial settlement proceedings and any subsequent trial.[89]

VI. LIMITS OF JUDICIAL AUTHORITY IN NON-TRADITIONAL PRETRIALS

Although the district courts have authority to require a pretrial conference,[90] it is unclear how far that authority reaches. The line between permissible and impermissible judicial influence in settlement discussions is nowhere defined. The American Bar Association Code of Judicial Conduct is silent on the matter, and the case law vacuous.[91] Widespread differences in pretrial practices and the dearth of appellate cases addressed to the procedure itself have meant that there are few discernable limits to the judicial power to define what is permissible pretrial activity.[92] The following inventory of case law developed from disputes involving pretrial settlement proceedings arising under both Rule 16 and state statutes will serve as a framework to aid in understanding constraints on judicial authority in non-traditional pretrials.

The use of pretrial proceedings is discretionary for each district court. Necessity of the pretrial order depends upon the unique facts of each case.[93] For instance, when the trial court would have been forced to conduct a trial within a trial as the parties argued over how the court should frame each issue, the pretrial was not required.[94]

It is not the purpose of Rule 16(c)(7) to impose settlement negotiations on unwilling litigants. The Advisory Committee's intent in providing for settlement conferences was to provide a neutral forum for such discussions.[95] In fact, each district court is permitted to exempt entire categories of cases in which the burdens of scheduling orders exceed the administrative efficiencies that would be gained.[96]

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88. *Id.* at 126-27.
89. N.D. CAL. L.R. 240.
90. FED. R. CIV. P. 16.
91. Oesterle, *Trial Judges in Settlement Discussions: Mediators or Hagglers?*, 9 CORNELL L. FORUM 7, 10 (1982).
92. J. LANDERS & J. MARTIN, CIVIL PROCEDURE 633 (1981).
93. MCI Communications Corp. v. AT&T 708 F.2d 1081, 1169 (7th Cir. 1983).
94. *Id.* at 1170.
95. FED. R. CIV. P. 16, advisory committee note, 1983 amendment, subdivision (c).
96. FED. R. CIV. P. 16(b); FED. R. CIV. P. 16, advisory committee note, 1983 amendment, subdivision (b).

Rule 16(c)(10) authorizes use of special pretrial procedures to expedite the adjudication of potentially difficult or protracted cases. It gives explicit authorization and encourages the use of procedures established by the district courts for this purpose. No particular technique is endorsed. A general maxim of flexibility and experience is the key.[97]

The district courts are empowered by Federal Rule of Civil Procedure 83 to adopt local rules governing procedure.[98] They are not required to enact local rules, however.[99] These rules must be consistent with the Federal Rules.[100] The experimental local rule in the Eastern District of Pennsylvania providing for compulsory, nonbinding arbitration as a prerequisite to jury trial in certain civil suits for recovery of money damages of $50,000 or less was held to be valid as it was not inconsistent with the Federal Rules of Civil Procedure.[101] Beyond consistency, the local rules are generally left to the judge's discretion. "Local rules for conduct of trial courts should not be ignored or declared invalid except for compelling reasons."[102] Considerable deference is accorded the district court's interpretation, and application of their own rules of practice are binding upon the parties until they are changed.[103]

In reviewing the validity of these local rules involving non-traditional pretrial proceedings, questions as to the litigants' rights to trial by jury and equal protection as well as concern for usurption of judicial authority have arisen.[104] Clearly, due process prevents any judge from compelling a settlement prior to trial on terms which one or both parties find completely unacceptable.[105] Critics express doubt that the procedure outlined in court-annexed arbitration programs such as the one in the Eastern District of Michigan actually protect the litigants' right to trial. The reservation to the parties of their right to trial is thought ineffective as that reservation is hedged by penalty provisions of "considerable severity."[106] The Pennsylvania Supreme Court has upheld, however, in two instances the Pennsylvania Health Care Services Malpractice Act which provides for compulsory arbitration against an attack based on the litigant's right to trial by jury.[107] The Pennsylvania Supreme Court

97. FED. R. CIV. P. 16, advisory committee note, 1983 amendment, subdivision (c).
98. FED. R. CIV. P. 83.
99. McCargo v. Hedrick, 545 F.2d 393, 402 (4th Cir. 1976).
100. *Id.*
101. Kimbrough v. Holiday Inn, 478 F. Supp. 566, 572 (E.D. Penn. 1979).
102. Wirtz v. Hooper-Holmes Bureau, Inc., 327 F.2d 939, 943 (5th Cir. 1964).
103. Smith v. Ford Motor Co., 626 F.2d 784, 796 (10th Cir. 1980).
104. Plourde, *Pretrial in Maine Under New Rule 16: Settlement, Sanctions, and Sayonara*, 34 ME. L. REV. 111, 128 (1982).
105. In re La Marre, 494 F.2d 753, 756 (6th Cir. 1974).
106. Roberts, *The Myth of Uniformity in Federal Civil Procedures: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 545 (1985).
107. Parker v. Children's Hosp. of Philadelphia, 483 Pa. 106, 119 (1978); Smith Case, 381 Pa. 223, 230 (1955).

noted that the right to trial by jury is not offended by the requirement in the Pennsylvania Health Care Services Malpractice Act that the complaining party must first proceed to arbitration as a condition precedent to trial by jury. Since any theoretical burden upon the victim's right to trial by jury is counterbalanced by substantial advantages provided to him or her under the Act and the restriction is not an "onerous" one which would make the litigant's right to present the issue to a jury practically unavailable, the act was upheld.[108] Both of the Pennsylvania Supreme Court cases were careful to note that the right to trial by jury was preserved only because there existed no imposition of "onerous" restrictions or conditions which would make the litigant's right of presenting the issue to a jury practically unavailable.[109] In the Eastern District of Pennsylvania, the court found that the application of the local experimental rule providing for compulsory, nonbinding arbitration as a prerequisite to jury trial in certain civil suits for recovery of money damages of $50,000 or less would not violate the litigant's right to trial by jury as guaranteed by the seventh amendment.[110]

Court-annexed arbitration programs similarly withstood the equal protection challenges. Both the District Court for the Eastern District of Pennsylvania and the Pennsylvania Supreme Court found no violation of equal protection on the grounds that the program treats litigants differently in similar districts or on the basis of interest and cost imposed or on the basis that the amount in controversy and subject matter jurisdiction provisions lack a rational basis. The District Court for the Eastern District of Pennsylvania noted that the test of whether the basis of the classification was reasonable and founded upon a genuine and not merely an artificial distinction was not one of the wisdom of the division but of the good faith in the classification.[111] The court also found that the requirement that the claimant seek redress through a statutorily created administrative remedy before seeking relief in court does not usurp power vested in the courts by the state constitution.[112]

Courts have upheld pretrial procedures instituted under local rules which have required litigants to attend hearings, disclose witnesses, prepare pretrial orders, and attempt to stipulate facts. The Sixth Circuit found that there were no grounds for denying a trial judge the power to require attendance of any party to the case at any session of the court where the judge deemed his presence to be necessary.[113] In fact,

108. Parker v. Children's Hosp. of Philadelphia, 483 Pa. 106, 119 (1978).

109. Parker v. Children's Hosp. of Philadelphia, 483 Pa. 106, 119 (1978); Smith Case, 381 Pa. 223, 231 (1955).

110. Kimbrough v. Holiday Inn, 478 F. Supp. 566, 567 (E.D. Penn. 1979).

111. Kimbrough v. Holiday Inn, 478 F. Supp. 566, 574 (E.D. Penn. 1979); Smith Case, 381 Pa. 223, 233 (1955).

112. Parker v. Children's Hosp. of Philadelphia, 483 Pa. 106, 119 (1978).

113. In re LaMarre, 494 F.2d 753, 756 (6th Cir. 1974).

Rule 16(c) explicitly requires that "at least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed."[114] However, the Advisory Committee notes that the reference to "authority" is not intended to insist upon the ability to settle the litigation. Nor should the rule be read to encourage the judge conducting the conference to compel attorneys to enter into stipulations or to make admissions that they consider to be unreasonable, that touch on matters that could not normally have been anticipated to arise at the conference or on subjects of a dimension that normally require prior consultation with and approval from the client.[115] A district court has the authority to order the attorneys for both parties to prepare for as well as to appear at a pretrial conference. It also has the authority, upon disregard of such order, to impose appropriate sanctions on the offending party and his counsel, including, if necessary, dismissal of the plaintiff's action.[116]

In a complex case, the trial court must manage the proceedings with a fair but firm hand to prevent excess expense and delay. The district court has the discretionary power to exclude exhibits which were not disclosed in compliance with a pretrial order.[117] A district court order requiring the Secretary of Labor to comply with the local rule requiring parties to disclose witnesses which each party would call or have available at trial was found to be within the power of the court upon review by the Fifth Circuit.[118]

The local rule of the Arizona District Court setting out a requirement for a stipulated form of the pretrial order which was to be jointly prepared and submitted to the court in anticipation of the pretrial conference was found to be valid by the Ninth Circuit.[119] The Seventh Circuit found that under the catchall clause of Rule 16 which permits the trial court to direct the attorneys for the parties to appear before it for a pretrial conference to consider certain prescribed matters and such other matters as may aid in the disposition of the action, the trial judge was clearly within his rights in asking counsel for the parties to *try* to stipulate all possible facts; however, such a rule does not *compel* stipulation of facts and did not authorize an order forcing parties to

114. FED. R. CIV. P. 16(c).

115. FED. R. CIV. P. 16 advisory committee note, 1983 amendment, subdivision (c).

116. Silas v. Sears, Roebuck & Co., 586 F.2d 382, 385 (5th Cir. 1978).

117. Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 897 (8th Cir. 1978).

118. Wirtz v. Hooper-Holmes Bureau, Inc., 327 F.2d 939, 943 (5th Cir. 1964).

119. Transamerica Corp. v. Transamerica Bancgrowth Corp., 627 F.2d 963, 965 (9th Cir. 1980).

stipulate facts.[120] The same court later clarified its position when it held that the rule giving district courts wide discretion and power to advance the cause and simplify procedure before the cause was presented to the jury does not, by its terms, confer upon the court power to compel litigants to obtain admissions of fact and of documents even if it is clear that such admissions would simplify trial of the case. Parties are required, however, to appear and consider the possibility of admissions which would lessen their task at trial.[121]

The Seventh Circuit, however, limited judicial authority in the pretrial setting as it related to discovery. It found that the district court was not authorized to enter an order compelling plaintiff's counsel to conduct discovery which would provide facts to be contained in the pretrial report, and hence, its dismissal of the complaint based on a failure to file a report could not be upheld. Notwithstanding that its order was based on a commendable desire to simplify the lawsuit, when the plaintiff did not engage in conduct that could be characterized as a failure to prosecute, in that it was ready to go to trial, and simply disagreed with the district court about the desirability of eliminating the need to develop all of the facts at trial, the court could not dismiss the complaint.[122]

District courts may sanction litigants, their attorneys, or both for failure to comply with local rules governing the pretrial conference. "It is beyond peradventure that all federal courts have the power, by statute, by rule, and by common law, to impose sanctions against recalcitrant lawyers and parties litigant."[123] Incidental to the responsibility of the federal district judge to supervise the pretrial phase of litigation, the judge is vested with correlative authority to impose reasonable sanctions for breach of a reasonable rule.[124] The discretion vested in the trial court to select an appropriate sanction for a party's noncompliance with a pretrial order is broad but not unlimited.[125] To withstand appellate reversal, the choice of a particular sanction in a given case for non-compliance with a pretrial order need merely fall within the permissible range of the court's discretion in light of the circumstances.[126] In reviewing the action of a district court in imposing a sanction for failure to comply with the local rule governing pretrial conferences, the standard of review is not whether the court would as an original matter have

120. J. F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1322 (7th Cir. 1976).

121. Identiseal Corp. of Wis. v. Positive Identification, 560 F.2d 298, 302 (7th Cir. 1977).

122. *Id.*

123. Carlucci v. Piper Aircraft Corp., 775 F.2d 1440, 1446 (11th Cir. 1985).

124. Delta Theatres, Inc., v. Paramount Pictures, Inc., 398 F.2d 323, 324 (5th Cir. 1968).

125. Silas v. Sears, Roebuck & Co., 586 F.2d 382, 385 (5th Cir. 1978).

126. *Id.*

imposed the sanction but whether the district court abused its discretion.[127]

Court sanctions run the gamut from required payment of the other party's attorney fees through dismissal of the action for failure to prosecute.[128] While dismissal is available, particularly in cases where the neglect was plainly attributable to an attorney rather than his blameless client,[129] the Seventh Circuit opined that the ultimate sanction of dismissal should be utilized only in the face of conduct so reprehensible that no other alternate sanction would protect the integrity of the pretrial procedures contemplated by the Rule.[130] The Fifth Circuit reversed a dismissal even after the plaintiff's counsel failed to appear at the scheduled pretrial conference, failed to prepare a pretrial stipulation, and failed to respond to interrogatories because his conduct lacked the requisite "contumacious" nature.[131]

The sanction of dismissal must remain available to the district courts in appropriate cases, however, not merely to penalize those whose conduct may be deemed to warrant such sanction, but to deter those who might be tempted to such conduct in the absence of such deterrent.[132] The Supreme Court found that the district court in *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633 (1962) did not abuse its discretion in dismissing a complaint with prejudice sua sponte for failure to prosecute, when the plaintiff's counsel failed to appear at a duly scheduled pretrial conference, in view of his prior history of delays. The Court also noted in this decision that it was not necessary to afford the parties notice of the trial court's intention to dismiss the action or provide an adversarial hearing before acting.[133] Four factors which the Fourth Circuit looked to in evaluating whether dismissal is proper include: the degree of personal responsibilty on the part of the plaintiff; the amount of prejudice to the defendant caused by the delay; whether the trial court has considered sanctions less drastic than dismissal; and whether the record supports a "drawn out history" of "deliberately proceeding in a dilatory fashion."[134]

Other sanctions available to the courts include the award of attorney's

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127. Transamerica Corp. v. Transamerica Bancgrowth Corp., 627 F.2d 963, 966 (9th Cir. 1980).

128. Link v. Wabash R.R. Co., 370 U.S. 626, 630 (1962); Miranda v. Southern Pacific Transp. Co., 710 F.2d 516, 520-21 (9th Cir. 1983); McCargo v. Hedrick, 545 F.2d 393, 396 (4th Cir. 1976); Russell v. Cunningham, 233 F.2d 806, 807 (9th Cir. 1956).

129. Silas v. Sears, Roebuck & Co., 586 F.2d 382, 385 (5th Cir. 1978); McCargo v. Hedrick, 545 F.2d 393, 396 (4th Cir. 1976); Plourde, *Pretrial in Maine Under New Rule 16: Settlement, Sanctions, and Sayonara*, 34 ME. L. REV. 111, 131-32 (1982).

130. J. F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1324 (7th Cir. 1976).

131. Silas v. Sears, Roebuck & Co., 586 F.2d 382, 385 (5th Cir. 1978).

132. National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976).

133. Link v. Wabash R.R., 370 U.S. 626, 632 (1962).

134. McCargo v. Hedrick, 545 F.2d 393, 396 (4th Cir. 1976).

fees and the exclusion of evidence.[135] Rule 16(f) specifically provides that in lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.[136] The Advisory Committee Note lists possible sanctions as follows: a preclusion order, striking a pleading, staying the proceedings, a default judgment, contempt, and charging a party, his attorney or both with expenses and attorney's fees is not restricted to the case in which the action is filed in bad faith. Bad faith may be found not only in actions that led to the lawsuit but also in the conduct of the litigation.[137] However, the Ninth Circuit has declined to impose attorney's fees in the absence of evidentiary support for the proposition that the plaintiff intended to harass the defendant.[138] The Supreme Court failed to award attorney's fees to a sucessful plaintiff in an action under 42 U.S.C. section 1983 when the defendant offered to settle in pretrial and the subsequent judgment was less than the offered settlement.[139]

District courts also have the authority to impose monetary sanctions on attorneys for misconduct as evidenced by the evolution of that sanction in the Third Circuit.[140] When the question of a district court's authority to require a defendant's counsel to pay a fine for failure to file a pretrial memorandum within the time limited by the standing order arose in 1962, that Circuit held in *Gamble v. Pope & Talbot, Inc.* that the district court lacked the authority to do so.[141] When the question was revisited in 1985, the Third Circuit reversed itself and held that imposition of a monetary sanction by a district court on an attorney for misconduct was permissible but that due process required notice and opportunity to be heard.[142]

VII. CONCLUSION

As the foregoing survey of authorities indicates, limitations on judicial

135. Miranda v. Southern Pacific Transportation Co., 710 F.2d 516, 520-21 (9th Cir. 1983); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 897 (8th Cir. 1978).

136. FED. R. CIV. P. 16(f).

137. FED. R. CIV. P. 16 advisory committee note, 1983 amendment, subdivision (f); Roadway Express, Inc., v. Piper, 447 U.S. 752, 766 (1980)(pretrial order relating to discovery and filing of briefs).

138. Russell v. Cunningham, 233 F.2d 806, 810 (9th Cir. 1956).

139. Marek v. Chesny, 473 U.S. 1 (1985).

140. Eash v. Riggins Trucking, Inc., 757 F.2d 557, 570 (3rd Cir. 1985).

141. 307 F.2d 729 (3rd Cir. 1962).

142. Eash v. Riggins Trucking, Inc., 757 F.2d 557, 570 (3rd Cir. 1985).

authority under Civil Rule of Procedure 16 are still developing. The relevant authorities, consisting of Rule 16, its accompanying Advisory Committee Note, and relevant case law, constitute only a few "dots" in a dot-to-dot line drawing which has yet to be completed. From this framework, however, it is possible to glean a few guidelines. Limitations of judicial authority under Rule 16 arise from two sources: constitutional constraints and the Rule itself. The case law arising out of Pennsylvania's Medical Malpractice Act lends credence to the proposition that the nontraditional pretrial procedures discussed previously could withstand constitutional scrutiny. There should be grave doubt, however, as to the ability of the nontraditional pretrial settlement procedures to withstand judicial review in light of the intent of Rule 16.

As the cases arising under the Pennsylvania Medical Malpractice Act indicate, court-annexed alternative dispute resolution mechanisms have passed due process and equal protection muster. Under the Pennsylvania Act, compulsory proceedings were upheld against claims of infringement upon the plaintiff's right to trial by jury. The resultant test reveals that a burden on the right to trial by jury will be acceptable, if it is counterbalanced by "substantial advantages" provided by the procedure. It is unclear whether the counterbalance is applied to the facts in each individual's circumstance or as it relates to the entire class of individuals affected by the pretrial settlement proceeding. The burden, however, may not be, in any instance, an "onerous" one which would make the litigant's right to present the issue to a jury practically unavailable.

The pretrial settlement proceedings previously discussed are likely to meet this test in that they have provisions analagous to those present in the Pennsylvania Medical Malpractice Act which compel the plaintiff to participate in pretrial settlement proceedings prior to a trial by jury. Whether the right to trial by jury is constrained by "onerous" conditions in the nontraditional pretrials previously discussed appears to be an issue of fact. Assuming that the test of an "onerous" condition is whether the litigant's right to present the issue to a jury is practically unavailable, it is unlikely that the nontraditional pretrials previously discussed will be found to impel a finding of an "onerous" condition. The fact that all of these programs provide that evidence of the fact or the content of the arbitration would not be admissible in the event of a subsequent trial supports this contention. However, the penalty provisions which require the litigant to improve the award in the subsequent proceeding or pay an additional fee for the arbitration could be construed to be an "onerous" condition, if the penalty were of sufficient severity. The existing authorities consulted give little indication of what degree of constraint is necessary to constitute an "onerous" condition. Thus, any extrapolation of what will constitute an "onerous" condition is necessarily

tenuous. While it is possible that constitutional challenges may arise in response to compulsory court-annexed alternative dispute resolution programs, it is unlikely that they will meet with success.

The equal protection concerns were met in the Pennsylvania cases when it was held that the basis of the classification of individuals assigned to compulsory arbitration was reasonable and founded upon a genuine and not merely an artificial distinction. The Court specifically upheld compulsory arbitration proceedings in which claimants were classified by the amount in controversy and the subject matter of the dispute. These classifications are very similar to those made in the sample nontraditional pretrials arising under Rule 16 which were examined earlier. As long as these proceedings continue to identify participants using such criteria as the amount in controversy and the subject matter of the dispute, it is likely that these settlement proceedings will also pass inspection for equal protection compliance. However, concerns could arise if judicial prudence is not used to constrain those programs which choose participants solely on judicial discretion.

Consultation of the language of Rule 16 supports the proposition that these programs are within the purview of judicial authority. Rule 16(a)(5) authorizes the court to direct the attorneys for the parties and any of the unrepresented parties to appear before it for a conference or conferences before trial for the purpose of facilitating the settlement of the case. Rule 16(b)(10) authorizes the use of special pretrial procedures to expedite the adjudication of potentially difficult or protracted cases. Rule 16(c)(10) generally requires that at least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. All of the above enumerated provisions seem to support court-annexed alternative dispute resolution programs such as those earlier surveyed.

Concerns should arise, however, with regard to the consistency of the court-annexed alternative dispute resolution mechanisms and the intent of Rule 16. In enacting these provisions in the 1983 amendments, the Advisory Committee noted that the intent in providing for settlement conferences was to provide a neutral forum for settlement discussions. It explicitly noted that the purpose of Rule 16(c)(7) was not to *impose settlement negotiations on unwilling litigants.* The Advisory Committee notes that the reference to the attorney's "authority" in Rule 16(c) is not intended to insist upon the ability to settle the litigation. Nor should the rule be read to encourage the judge conducting the conference to compel attorneys to enter into stipulations or to make admissions that they consider to be unreasonable or that touch on matters that could not normally have been anticipated to arise at the conference or on subjects of a dimension that normally require prior consultation with

and approval from the client. Although these comments are not within the language of the Rule itself, they must be considered in interpreting that language. It appears that the intent of the 1983 amendments to Rule 16 was to make a forum for settlement available to the parties before the trial, not to force parties into settlement proceedings. While the court-annexed alternative dispute resolution programs are likely to be constitutional, a challenge beyond the intent of Rule 16 could pose a serious threat to such programs.

Cheryl L. Roberto